Lee Chua v Mustapa bin Osman

HIGH COURT (MALACCA) — CIVIL APPEAL NO 11-20-1994
SURIYADI JC
31 JULY 1995

Land Law *— Tenancy — Vacant possession — Tenancy agreement illegal — Land Malay Customary Land — Whether order for vacant possession should be made — Whether landlord should get benefit of illegal contract — National Land Code (Penang and Malacca Titles) Act 1963 s 108*

Contract *— Illegality — Tenancy agreement made which contravened statute — Whether order for vacant possession could be granted — Effect of illegality upon contract — National Land Code (Penang and Malacca Titles) Act 1963 s 108*

On 9 March 1981, the plaintiff as the registered owner of land, which was a Malay Customary Land, assigned the premises to the defendant for RM10,000 by a deed of assignment. The plaintiff in another separate document which bore the same date agreed to let the premises at monthly rental of RM15 to the defendant.

On 28 May 1993, the plaintiff terminated the tenancy and directed the defendant to vacate the premises. The defendant failed to do so. The plaintiff applied by way of summons for an order of vacant possession and mesne profits.

On 29 November 1993, the defendant submitted his defence and counterclaim and alleged that the plaintiff had breached the agreement of 9 March 1981 and he was thus was entitled to damages.

Before the trial proper, the defendant made certain preliminary objections, inter alia, that the contract was void ab initio. Plaintiff's counsel agreed on the preliminary objection. The preliminary objection was upheld but the magistrate granted an order for vacant possession. The defendant appealed and submitted that since the whole contract was void ab initio the magistrate should have dismissed the summons and not ordered vacant possession.

Held, allowing the appeal and setting aside the magistrate's order:

(1) The premises was governed by s 108 of the National Land Code (Penang and Malacca Titles) Act 1963.

(2) Deciphering through the provisions of the National Land Code (Penang and Malacca Titles) Act 1963, it would appear that the premise could not be transferred, leased, transmitted or charged to any person other than a Malay. Such a lease included any tenancy.

(3) Under s 24 of the Contracts Act 1950 the assignment and the tenancy agreement was illegal and void ab initio.

(4) So long as there were provisions in the tenancy agreement which provided methods of effecting transfers of Reservation lands from Malays to non-Malays according to the statute and the parties did attempt to comply with the provisions albeit unsuccessfully it could not be said that those agreements had been attempts to evade the relevant Enactments.

(5) Section 104 of the National Land Code (Penang and Malacca Titles) Act 1963 allowed the State Authority to declare certain persons to be certificated persons. This would have meant a non-Malay who had been declared to be a certificated person could deal with that property in accordance with the provisions of the Code.

(6) The agreement did not contain provisions for the plaintiff or the defendant to obtain the prior approval of the State Authority to declare the defendant a certificated person. As it stood not only was the agreement void ab initio but had profited the plaintiff.

(7) No court would lend its aid to a man who founded his cause of action upon an immoral or an illegal act. If from the plaintiff's own stating or otherwise, the cause of action appeared to arise ex turpi causa, or the transgression of a positive law of the country, then he had no right to be assisted.

[Bahasa Malaysia summary

Pada 9 Mac 1981, plaintif sebagai tuanpunya berdaftar tanah, yang merupakan Tanah Adat Melayu, telah menyerahhak premis itu kepada defendan untuk RM10,000 melalui satu suratikatan penyerahhakan. Plaintif di dalam satu dokumen berasingan yang bertarikh sama bersetuju menyewa premis itu pada sewa bulanan RM15 kepada defendan.

Pada 28 Mei 1993, plaintif menamatkan penyewaan itu dan mengarahkan defendan mengosongkan premis itu. Defendan gagal berbuat demikian. Plaintif memohon melalui saman untuk satu perintah milikan kosong dan hasil perantaraan.

Pada 29 November 1993, defendan mengemukakan pembelaan dan tuntutan balasnya dan mendakwa bahawa plaintif telah mengingkari perjanjian 9 Mac 1981 dan beliau oleh itu berhak mendapat ganti rugi.

Sebelum perbicaraan, defendan membuat beberapa bantahan awal, antara lainnya, bahawa kontrak itu adalah tak sah ab initio. Peguambela plaintif bersetuju dengan bantahan awal itu dan bantahan itu diluluskan tetapi majistret membenarkan perintah untuk milikan kosong. Defendan merayu dan berhujah bahawa memandangkan yang keseluruhan kontrak itu adalah tak sah ab initio majistret sepatutnya menolak saman itu dan tidak memerintahkan milikan kosong.

Diputuskan, meluluskan rayuan itu dan mengetepikan perintah majistret:

(1) Premis itu tertakluk kepada s 108 Akta Kanun Tanah Negara (Hakmilik Pulau Pinang dan Melaka) 1963.

(2) Membaca peruntukan Akta Kanun Tanah Negara (Hakmilik Pulau Pinang dan Melaka) 1963, nampaknya premis itu tidak boleh dipindahmilik, dipajak, diturunkan atau digadai kepada mana-mana orang selain daripada seorang Melayu. Pajakan sedemikian merangkumi mana-mana penyewaan.

(3) Di bawah s 24 Akta Kontrak 1950 penyerahhakan dan perjanjian penyewaan itu adalah menyalahi undang-undang dan tak sah ab initio.

(4) Selagi terdapat peruntukan di dalam perjanjian penyewaan itu yang memperuntukkan kaedah untuk menjalankan pemindahanmilik tanah rizab dari orang Melayu kepada orang bukan Melayu mengikut statut dan pihak-pihak itu cuba memenuhi peruntukan itu walaupun tidak berjaya, tidaklah boleh dikatakan bahawa perjanjian itu adalah percubaan mengelak Enekmen-Enekmen yang berkenaan.

(5) Seksyen 104 Akta Kanun Tanah Negara (Hakmilik Pulau Pinang dan Melaka) 1963 membenarkan Pihak Berkuasa Negeri mengisytiharkan orang-orang tertentu sebagai orang yang diperakui. Ini bermakna bahawa seorang bukan Melayu yang telah diisytiharkan sebagai seorang yang diperakui boleh berurusniaga dalam hartanah itu mengikut peruntukan Kanun itu.

(6) Perjanjian itu tidak mengandungi peruntukan untuk plaintif atau defendan mendapat kebenaran terdahulu Pihak Berkuasa Negeri untuk mengisytiharkan defendan sebagai orang yang diperakui. Dalam bentuknya itu perjanjian itu dukan sahaja tak sah ab initio tetapi telah menguntungkan plaintif.

(7) Tiada mahkamah yang boleh memberi bantuan kepada seorang yang mengasaskan kausa tindakannya pada satu tindakan yang tidak bermoral atau menyalahi undang-undang. Jika dari kenyataan plaintif sendiri atu sebaliknya, kausa tindakan itu nampaknya timbul ex turpi causa, atau melanggar undang-undang positif negara, maka beliau tidak berhak dibantu.]

Notes

For cases on illegality of contracts, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue), paras 1733–1810.

For cases on application for vacant possession, see 8 *Mallal's Digest* (4th Ed), paras 2061–2063.

Cases referred to

Archbolds (Freightage) Ltd v S Spanglett Ltd (Randall, Third Party)

[1961] 1 QB 374 (folld)
Cheong Lep Keen v Tan Tin Kek [1968] 2 MLJ 126 (refd)
Foo Say Lee v Ooi Heng Wai [1969] 1 MLJ 47 (folld)
Goh Soon Leong v Commissioner of Lands [1951] MLJ 201 (folld)
Holman v Johnson (1775) 1 Cowp 341 (folld)
Idris bin Haji Mohamed Amin v Ng Ah Siew [1935] MLJ 257 (folld)

Legislation referred to

Contracts Act 1950 s 24
Malay Reservations Enactment 1913 (Perak) s 8
Malay Reservations Enactment 1913 (Perak) s 13
Malay Reservations Enactment 1930 (Kelantan) s 12(i)
Malay Reservations Enactment 1930 (Kelantan) s 13A(i)
Malay Reservations Enactment 1963 (Kedah)
National Land Code (Penang and Malacca Titles) Act 1963 ss 104, 108
Registration of Deeds Ordinance (SS Cap 121)

Michael Tan (*Ng, Goh & Co*) for the appellant.
Cik Saila (*Mohd Ali & Co*) for the respondent.

Suriyadi JC: On 12 December 1994 the magistrate's court in Melaka allowed a vacant possession action by the plaintiff without cost. The background of the case was that a deed of assignment was signed between the plaintiff and the defendant on 9 March 1981. Among the provisions of the agreement was that the plaintiff as the registered owner of Lot 66 Kawasan Bandar XXXVI on which premise stood a house addressed as No 90 Jalan Semabok Melaka assigned to the defendant the said premise for RM10,000. The plaintiff in another separate document which bore the same date agreed to let the said premise at a monthly rental of RM15 to the defendant. Twelve years later, on 28 May 1993, the plaintiff terminated the tenancy and directed the defendant to vacate that land by 30 June 1993 but had failed to do so. The plaintiff vide Summons No 1446–1993 demanded for an order of vacant possession of that said land, mesne profits at RM17 per month from 1 July 1993 until the determination of this case, damages and lastly cost.

The defendant on 29 November 1993 submitted their defence and counterclaim with the agreement of 9 March 1981 as their main weapon. The defendant alleged that the plaintiff had breached that agreement and thus was entitled to damages.

Before the trial proper could get off the ground the defendant made certain preliminary objections founded on the issue of locus standi of the plaintiff, a matter which is not being taken up now, and the foundation of the contract which was void ab initio. The preliminary objections were successfully canvassed by the defendant. At the appeal stage the defendant again argued substantially on the same format as they did at the subordinate court except that they disagreed with the

A eventual decision of the magistrate to allow the action. The defendant submitted that since the whole contract was void ab initio the relevant magistrate should have just dismissed the case and refrained from giving any consequential orders.

Since this appeal was a rehearing of the matter the court studied
B the matter again with a fine toothcomb. No doubt I had the assistance of two counsel but unfortunately both parties were very brief in their submissions and were unable to contribute much in assisting the court in coming to a correct conclusion. From a perusal of the facts it is undeniable that the premises was governed by s 108 of the National Land Code (Penang and Malacca Titles) Act 1963 and consequently
C was subject to the old National Land Code. The new National Land Code came into effect on 7 September 1984. For easy reference I reproduce s 108 of the National Land Code (Penang and Malacca Titles) Act 1963 which reads:

> (1) Subject to the provisions of Chapter 3, the following provisions shall
> D apply to land subject to the provisions of this Part —
>
> (a) no such land may at any time be transferred, leased, transmitted or charged to any person other than a Malay. For this purpose 'lease' includes any tenancy of whatever form or duration;
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> ...
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> E (4) Any transfer, lease, transmission or charge contrary to the provisions of paragraph (a) of subsection (1) shall not be valid for the purpose of registration under this Part and shall not be capable of registration under the National Land Code.
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> (5) No action for breach of contract shall lie in respect of any dealing in or disposal of or any attempt to deal in or dispose of any land subject
> F to the provisions of this Part contrary to the provision of subsection (1) and no rent paid in pursuance of such dealing or attempt shall be recoverable in any Court.

As the contract was in contravention of the prevailing law on 9 March 1981 s 24 of the Contracts Act 1950 would be highly relevant. It reads:

> G The consideration or object of an agreement is lawful, unless —
>
> (a) it is forbidden by a law;
>
> (b) it is of such a nature that, if permitted, it would defeat any law;
>
> ...
>
> H In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

Deciphering through the provisions of the National Land Code (Penang and Malacca Titles) 1963 it would appear that this relevant premises
I which is a Malay Customary Land could not be transferred leased, transmitted or charged to any person other than a Malay. Such a lease included any tenancy. It is also quite clear that under s 24 of the Contracts Act 1950 the assignment and the tenancy agreement was illegal and void ab initio. From the notes of evidence it would appear

that the plaintiff agreed with this objection. I lay down verbatim what was said by Cik Saila who represented the plaintiff: A

> Oleh yang demikian kami tidak mahu buang masa dengan mahkamah dan kami setuju ini tanah MCL dan tanah tersebut tidak seharusnya disewa atau diassign kepada orang yang bukan Melayu di dalam kes ini. Oleh itu seperti yang telah diwajibkan di bawah s 24 Akta Kontrak; kontrak tersebut adalah tidak sah dan akibatnya kontrak tersebut adalah void ab initio. B

I was sympathetic with the submission of the defendant as, despite the concurrence of the plaintiff at p 57 of the appeal record (Tambahan 3) and after the learned magistrate had correctly accepted the preliminary objections issued the consequential orders. Instead of dismissing the case outright vacant possession was given to the plaintiff within four months from 12 December 1994. The plaintiff had submitted the case of *Cheong Lep Keen & Anor v Tan Tin Kek* [1968] 2 MLJ 126 in which case the defendant was in occupation of certain premises under an agreement which purported to be a lease for 80 years. The High Court held that since the lease was not registered under the Registration of Deeds Ordinance (SS Cap 121) the lease was considered void but as a monthly rent had been paid the tenancy was deemed to be a monthly one. Since it was a monthly tenancy and had been validly terminated vacant possession of the premises was ordered by the court. I do not find this case relevant as the facts and law are not on all fours with the present issue. In the above case the converted monthly tenancy was legalised by intervening factors whilst in our present case the contract was void ab initio at the outset and was incapable of being saved by any intervening factors. C D E

There are not many decided cases with regard to s 108 of the National land Code (Penang and Malacca Titles) 1963 and as such the court has to revert to cases that dealt with Malay Reservation land problems for assistance. I begin with the case of *Idris bin Haji Mohamed Amin v Ng Ah Siew* [1935] MLJ 257 where Thomas CJ concluded that the power of attorney in favour of Ng Ah Siew which related to a right or interest in Malay Reservation land was contrary to s 8 of the Malay Reservations Enactment 1913 (Perak) and as such was null and void. Section 8 provided that no right or interest of any Malay in any Reservation land shall be transferred to or vest in any person not being a Malay. Section 13 further provided that any dealings or disposals contrary to the provisions of this Enactment would be null and void. F G H

In *Goh Soon Leong v Commissioner of Lands & Ors* [1951] MLJ 201 the question mooted was whether under the Malay Reservations Enactment 1963 (Kedah) a transfer by a Malay to a non Malay was void ab initio. From the reading of the relevant provisions in that Enactment the court was of the opinion that the transfer was not absolutely prohibited or necessarily void ab initio. But then again, as Taylor J emphasised, that judgment related exclusively to land in Kedah and had no necessary application to other states where some of the corresponding laws were differently worded. I

Subsequently in the case of *Foo Say Lee v Ooi Heng Wai* [1969] 1 MLJ 47 the question of whether a transfer of Malay Reservation land to a non Malay was void was canvassed again. Section 12(1) of the Malay Reservations Enactment 1930 (Kelantan) provided that all dealings or disposal whatsoever and all attempts to deal in or dispose of Reservation land contrary to the provisions of this Enactment would be null and void. Section 13A(i) of the same Enactment gave the power to the Ruler in Council in his discretion to approve the transfer of a Reservation land from a Malay to a non Malay. Azmi CJ (Malaya) in deciding that the transaction was not an attempt to deal in the Reservation land contrary to the provisions of the Enactment said:

> My reasons are simply this. Section 3A(i) of the Enactment gives the power to His Highness the Ruler in Council in his discretion to approve a transfer of a right or interest of any Malay in Reservation land to any person not being a Malay. Since the Enactment itself has provided a method of effecting a transfer of Reservation land from a Malay to a non-Malay, I am unable to come to the conclusion that any agreement to transfer such land by a method so provided by the Enactment itself, can be said to be contrary to the provisions of the Enactment and therefore null and void under s 12; nor could it be said that the agreement is an attempt to evade the provisions of the Enactment.

From a perusal of the three cases I conclude that so long as there are provisions which provide methods of effecting transfers of Reservation lands from Malays to non-Malays and parties do attempt to comply with the provisions albeit unsuccessfully it cannot be said that those agreements were attempts to evade the relevant Enactments.

In the current case even though the general provisions specify that only Malays are entitled to possess Malay Customary Land s 104 of the National Land Code (Penang and Malacca Titles) Act 1963 allows the State Authority to declare certain persons to be certificated persons. This would mean a non-Malay who has been declared to be a certificated person can deal with that property in accordance with the provisions of the Code.

From the facts of the agreement it would appear that the plaintiff had contracted with the defendant an agreement which did not provide provisions for the plaintiff or the defendant to obtain the prior approval of the State Authority to declare the defendant a certificated person. Had this provision been embedded in the two agreements the reasoning of Azmi CJ in the case of *Foo Say Lee v Ooi Heng Wai* would be applicable and perhaps save the agreement. As it stands not only is the agreement void ab initio but has profited the plaintiff. He not only received RM10,000 as per the assignment agreement but had also received monthly rentals of RM15 from the defendant. Having received that large sum of money from an illegal contract he now wants to boot out the defendant by utilising and exploiting the void contract which had enriched him. To go along with his scheme would at best make a mockery of justice. Should he get away with it?

In *Archbolds (Freightage) Ltd v S Spanglett Ltd Randall (Third Party)* [1961] 1 QB 374 at p 388; [1961] 1 All ER 417 at p 424, Devlin LJ said:

> The effect of illegality upon a contract may be threefold. If at the time of making the contract there is an intent to perform it in an unlawful way, the contract, although it remains alive, is unenforceable at the suit of the party having that intent; if the intent is held in common, it is not enforceable at all. Another effect of illegality is to prevent a plaintiff from recovering under a contract if in order to prove his rights under it he has to rely upon his own illegal act; he may not do that even though he can show that at the time of making the contract he had no intent to break the law and that at the time of performance he did not know that what he was doing was illegal. The third effect of illegality is to avoid the contract ab initio and that arises if the making of the contract is expressly or impliedly prohibited by statute or is otherwise contrary to public policy.

Lord Mansfield in *Holman v Johnson* (1775) 1 Cowp 341 said:

> No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, then the court says he has no right to be assisted. It is upon that ground the court goes not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would not then have the advantage of it; for where both are equally at fault, potior est conditio defendantis.

Reverting to the present case para 6 of the statement of claim had alleged that the defendant had failed to fulfill the obligations of the agreement dated 9 March 1981 between the plaintiff and the defendant and were thus entitled to certain prayers. With the above facts and law in mind the court was of the opinion that the learned magistrate should not have made the consequential orders and thus set aside the order of the lower court. The case of 72–1446/93 was struck off and the case of 72–1101/93 would be bound by this decision.

Appeal allowed.

Reported by TC Chong